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IN THE

Supreme Court of the United States

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October Term, 1969
No. 634

JOHN FREDERICK WEERSING,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
(28 U.S.C. §1254(1)).

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PETITION FOR WRIT OF CERTIORARI (28 U.S.C. §1254(1)).

To the Honorable Chief Justice of the United States Supreme Court, and to the Honorable Associate Justices Thereof:

Petitioner, John Frederick Weersing, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, made and entered on August 7, 1969, in the case entitled *United States of America v. John Frederick Weersing,* No. 23055.

Opinion Below.

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit is not yet reported; and a copy of said opinion and judgment is appended hereto as Appendix "A."

Jurisdiction.

1. The judgment of said Circuit Court of Appeal was filed and entered on August 7, 1969.

2. No application for rehearing was made to said Circuit Court, and no rehearing of the cause has been ordered by said court.

3. The date for filing this Petition, under Rule 22 of the Rules of the Supreme Court, was September 6, 1969; but time to file same was extended to September 22, 1969 by order of Mr. Justice Douglas, dated September 12, 1969.

4. Jurisdiction to review said judgment of said Circuit Court is conferred on this court by Title 28 U.S.C. §1254(1).

Questions Presented.

The only question presented by this Petition is the following:

WHETHER PETITIONER'S CONVICTION FOR REFUSAL TO SUBMIT TO INDUCTION PURSUANT TO AN ORDER "DULY GIVEN" BY HIS DRAFT BOARD VIOLATES DUE PROCESS OF LAW WHERE THE ONLY PROOF OF AN ESSENTIAL ELEMENT OF SAID OFFENSE RESTS SOLELY UPON A PRESUMPTION UNAUTHORIZED BY STATUTE, IMPOSED WITHOUT NOTICE AND BY IMPLICATION, AND UNSUPPORTED BY REASON, COMMON EXPERIENCE, FACT OR LAW, AND WITHOUT ANY RATIONAL CONNECTION TO ANY FACT PROVED.

Constitutional Provisions, Statutes and Administrative Regulations Involved.

The constitutional provision involved herein is the Fifth Amendment to the United States Constitution which states, in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property without due process of law . . ."

The statutes involved herein are Title 50 U.S.C. App. §§454, 455, and 462; which are set forth, respectively, in Appendix "B", "C" and "D" hereof.

The administrative regulations involved herein is 32 C.F.R. §1631.7, which is set forth in Appendix "E" hereof.

Statement of the Case.

Summary of Proceedings Below.

On March 27, 1968, a one-count indictment was returned and filed in United States District Court for the Central District of California [C. T. 2-3],[1] charging Petitioner with violation of 50 U.S.C.A. §462 by refusing to submit to induction pursuant to "a notice and order by said Local Board No. 139 . . . duly given to the defendant . . ."[2]

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[1]C. T. represents the Clerk's Transcript of the certified record of the proceedings in the District Court below; and the number refers, of course, to the pages thereof at which the decided reference may be found.

[2]Said indictment reads in pertinent part, as follows:

> "Defendant JOHN FREDERICK WEERSING . . . registered as required by said [Universal Military Training and Service] Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 94, Los Angeles, California; pursuant to said Act and the regulations promulgated thereunder, the defendant was clas-

(This footnote is continued on the next page)

Jurisdiction of the United States District Court to try said offense was derived from Title 18 U.S.C. §3231.

Petitioner was arraigned on said indictment and entered a plea of not guilty thereto on April 15, 1968 [C. T. 4]. Thereafter, Petitioner, being represented by counsel at all stages of the proceedings against him, waived a jury and special findings [C. T. 5].

On May 7, 1968, Petitioner's case came on for trial before the Hon. Irving Hill, Judge of the United States District Court for said district [C. T. 28]. Following a court trial, and upon submission of the cause, the court found Petitioner guilty of the offense charged [C. T. 28].

On May 27, 1968, Petitioner was sentenced by the trial court to three (3) years imprisonment and judgment was entered accordingly [C. T. 36].

Notice of Appeal was filed on May 27, 1968 [C. T. 37]; and the United States Court of Appeals for the Ninth Circuit affirmed said judgment on August 7, 1969 (Opinion, Appendix "A").

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sified in Class 1-A and was subsequently notified of said classification by said Board; thereafter said Board transferred the defendant for induction to Transfer Board 139 in San Diego County, California, both of said Boards being then and there, and at all times herein mentioned, duly created and acting under the Selective Service System established by said Act, thereafter [sic] a notice and order by said Local Board No. 139 was duly given to the defendant to report for induction into the armed forces of the United States of America on August 29, 1967 in Los Angeles County, within the Central District of California; and at said time and place the defendant knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do."

How the Question Arose.

The government's case at trial consisted solely of Petitioner's Selective Service file which was admitted in evidence without objection [R. 5, 8];[3] and which contained, among other documents, petitioner's induction orders (SSF 111, 154).

Petitioner filed a written motion for judgment of acquittal specifying eight (8) grounds in support thereof, including the following: [C. T. 26, 27]

"* * *

5. The government has wholly failed to prove a violation of the Act and Regulations by the defendant as charged in the indictment.

* * *

7. The Local Board did not follow the Selective Service Regulations in its consideration of the defendant's claim and evidence.

* * *"

The only evidence offered by the defence was the testimony of Petitioner who took the stand and testified briefly on a point not raised here [R. 11-22]. The defence thereupon rested, and Petitioner renewed and argued his motion for judgment of acquittal. The trial court denied said motion, and found Petitioner guilty as charged [R. 53; C. T. 28].

The government offered no evidence at trial to show the regularity of the order of call, or to establish the validity of the induction order.

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[3]R. refers to the Reporter's transcript of the oral proceedings had in the trial court; and the number signifies the pages thereof at which cited reference may be found.

Petitioner attacked the validity of the induction order at trial, albeit not upon the grounds urged here.[4]

Specifically, Petitioner did not expressly challenge the propriety of the order of call, although he contends here that Points 5 and 7 of his motion for judgment of acquittal should be construed to embrace this theory.

On appeal, the Petitioner contended, *inter alia,* that his conviction was not sustained by sufficient evidence in that there was no proof that he had been duly or lawfully selected for induction either pursuant to a meeting of his Local Board, or that he had been selected in the proper order (See: Petitioner's Opening Brief on Appeal, pp. 13 *et seq.*).

The Court of Appeals in its opinion (Appendix "A", at p. 2) held, in effect, that although the government had the burden of establishing the validity of the induction order, Petitioner waived the Order of Call point by failing to raise it at trial and declared that Petitioner's conviction was supported by the presumption of regularity accorded to the administrative proceedings leading up to his induction order (Op. pp. 2-3).

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[4]At trial, Petitioner focused his argument on two contentions: (1) that his personal appearance hearing before the Local Board was unfair and inadequate [R. 39-42, 11-22] and (2) that the Board's refusal to reopen his classification, after he had filed a post-induction claim for conscientious objector status was arbitrary and a denial of due process [R. 23-39].

On appeal, Petitioner also contended that the Board's denial of his occupational deferment claim was without basis and fact.

REASONS FOR GRANTING CERTIORARI.

I.

Preliminary Statement.

Although the Government failed to prove, or offer proof, that Petitioner was called up in regular order, as, in effect, was alleged in the Indictment, the Ninth Circuit held that where that issue was not raised at trial, such proof was obviated by the presumption of regularity which the Court found attached to the Selective Service proceedings giving rise to the issuance of Petitioner's Induction Order.

Petitioner contends, *inter alia,* that proof of proper order of call is an essential element of the offense and that resort to the presumption of regularity as a substitute therefor denies him due process of law in violation of the Fifth Amendment to the United States Constitution.

II.

Proof of a Valid Induction Order Is an Essential Ingredient of the Offense Charged; and Conviction Without Such Proof Offends Due Process.

Most circuits seem to agree that one of the essential elements in a prosecution for a refusal to submit to induction is proof that the induction order is valid (*Yates v. United States,* 404 F. 2d 462, reh'g den'd, 407 F. 2d 50, 51 (1st Cir. 1969); *Fannon v. United States,* 155 F. 2d 720, 721, 11 Alaska 91 (9th Cir., 1946); *Keene v. United States,* 266 F. 2d 378, 380 (10th Cir., 1959); but see; *United States v. Sandbank,* 403 F. 2d 38, 40 (2nd Cir., 1968); cert. den. ..... U.S. ....., 89 S. Ct. 1301 (1969); *United States v. Fatrick,* 140 F. 2d 5 (7th Cir., 1944).

The burden of proving a valid induction order lies and remains with the Government (*Yates v. United States, supra; Kretchet v. United States,* 284 F. 2d 561, 566 (9th Cir., 1960); *Franks v. United States,* 216 F. 2d 266, 270 (9th Cir., 1954); *Zuziak v. United States,* 119 F. 2d 140, 142 (9th Cir., 1941)).

An order to report for induction issued to a registrant called out of proper order is an invalid order (*United States v. Smith,* 291 F. Supp. 63 (D, N.H., 1968); *United States v. Miranda,* #73-76 (D, P.R., 11-18-68), 1 S.S.L.R. 3265 (unreported)).[5]

A registrant is under no duty to comply with an invalid induction order (*Estep v. United States,* 327 U.S. 114, 121-122, 66 S. Ct. 423, 427 (1946)).

Conviction upon a charge not made or proved is a denial of due process of law (*Johnson v. Florida,* 391 U.S. 596, 88 S. Ct. 1713 (1968); *Garner v. Louisiana,* 368 U.S. 157, 82 S. Ct. 248 (1961); *Thompson v. Louisville,* 362 U.S. 199, 204, 206, 80 S. Ct. 624, 628, 629 (1960)).

Failure to prove every element of the offense charged bars a conviction (*Christoffel v. United States,* 338 U.S. 84, 89, 69 S. Ct. 1447, 1450 (1949); *Ward v. United States,* 344 U.S. 924, 73 S. Ct. 494, rev'g 195 F. 2d 441 (5th Cir., 1952); *Venus v. United States,* 368 U.S. 345, 82 S. Ct. 384, rev'g 287 F. 2d 304 (9th Cir., 1960); *Fannon v. United States, supra,* 155 F. 2d 720).

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[5]S.S.L.R. refers to the Selective Service Law Reporter published in Washington, D.C., under the auspices of the Public Law Education Institute, and reporting opinions and proceedings or pertinent portions thereof, in selective service cases, some of which are not reported in the official reports.

Moreover after an Indictment has been returned, its charges may not be broadened or contracted through amendment except by the Grand Jury (*Ex parte Bain,* 121 U.S. 1, 7 S. Ct. 781 (1887) cited with approval in *Stirone v. United States,* 361 U.S. 212, 215-217, 80 S. Ct. 270, 272, 273 (1960)).

The Indictment at bar charged Petitioner with failure and refusal to submit to induction pursuant to an order from his draft board "duly given".

Hence, where the Government alleges that an induction order has been duly issued or given, it does not lie within the power of the Court or the Government to dispense with proof thereof (*Stirone v. United States, supra*).

The question, therefore, is whether the Due Process Clause of the Fifth Amendment permits reliance upon the presumption of regularity in lieu of affirmative proof of the proper order of call to support petitioner's conviction.

III.

Proof of Proper Order of Call Is an Issue Which May Not Only Affect the Due Process Rights of the Accused Registrant, but Tends to Safeguard the Integrity of the Selective Process.

In *Yates v. United States, supra,* 404 F. 2d at p. 466, the Court of Appeals for the first Circuit observed:

> ". . . There exists the possibility that capricious or arbitrary action was taken by a Local Board; a defendant has little opportunity to obtain proof of discrimination; and there is no chance or procedure to review this issue before the agency. There ought, therefore, to be a means of exerting constant pressure on the Local Boards to adhere faithfully to the order of call regulation."

Authority for the selection and induction process, as well as certain limitations thereon[6] lies in §5 of the Military Selective Service Act of 1967 [50 U.S.C. §455] enacted on June 30, 1967, which empowers the President to promulgate regulations toward that end.

Pursuant to that mandate, the President issued regulations, incorporated in 32 C.F.R. §1631, governing the establishment of quotas and the selection process.

Selection is based on the quota of men determined nationally and for each state by the National Director of Selective Service (32 C.F.R. §1631.2).

The State Director, in turn, allocates to each Local Board in his state the number of men required to be furnished by each board, and issues a Notice of Call on Local Board (SSS Form 201) "directing the Local Board to select and deliver for induction the number of men allocated to the Local Board" (32 C.F.R. §1631.6).

The Local Board is authorized to select and deliver only such number of men as will fill the call. Moreover, the mode of selection by the Local Board must follow a prescribed order, beginning with delinquents, volunteers, and non-volunteers, according to age and marital status, with the oldest first. (32 C.F.R. §1631.7).

In the trial of *United States v. John Raymond Jones*, #3450-EAC (C.D., Calif., August, 1969), Major Albert Madsen, Chief of Manpower Division of the California State Selective Service Headquarters, testified that it had been the State Director's practice to call up

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[6]For example, §455(a)(2) of Title 50 U.S.C. App., freezes the order of induction "for such registrants within such age groups as has been heretofore established and in effect" on the effective date of said statute.

two or three times the number of men to be inducted in order to insure that the State met its national quota.

Exhibits introduced in that case showed that over a two year period, said defendant's Local Board alone had a net total of forty (40) overcalls.[7]

Such procedure would appear to be at variance with the aforementioned Selective Service Regulations, and calls into question the very integrity of the Selective Service System. Moreover, it is apparent that an improper order of call may well prejudice the procedural due process rights of the registrant.

For example, following receipt of an induction notice, Petitioner filed a claim for classification as a Conscientious Objector, and requested that his classification be re-opened for that purpose (Op. 5; SSF 113).[8] The Courts below sustained the Local Board's refusal to re-open Petitioner's classification because it appeared from his communications to the Board that his beliefs had crystallized *before* the induction order had issued. Therefore, he could not show a change of circumstance beyond his control justifying the re-opening of his classification (Op. at p. 6; See: *United States v. Dugdale,* 389 F. 2d 482, 484-485 (1968); 32 C.F.R. §1625.2).

However, if Petitioner was selected out of order, his induction notice would thereby have been vitiated, and his Conscientious Objector claim would then have qualified for review (*Miller v. United States,* 388 F. 2d 973 (9th Cir., 1967)).

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[7]The undersigned has copies of the Exhibits above referred to, and will submit the same to the Court upon request. A transcript of the testimony above referred to was not yet available at the time this Petition went to the printer.

[8]S.S.F. refers to Petitioner's Selective Service File, received in evidence at trial as Exhibit A, and incorporated as a part of the Certified Record on Appeal and here.

IV.

It Is a Denial of Due Process to Substitute an Unfounded Presumption of Regularity for Proof of an Essential Element of the Offense.

This court has long held the view that:

> "The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption, but it does not supply proof of a substantive fact . . . nowhere is the presumption held to be a substitute for proof of an independent and material fact." (*United States v. Ross,* 92 U.S. 281, 284; *Sabriego v. Maverick,* 124 U.S. 261, 285).

A presumption cannot constitutionally stand in lieu of proof where unsupported by common experience or by substantial evidence, or where lacking a rational connection with the fact proved (*Leary v. United States,* 89 S. Ct. 1532, 1547 *et seq.* (1969); *United States v. Romano,* 381 U.S. 136, 141, 86 S. Ct. 279, 282 (1965); *Tot v. United States,* 319 U.S. 463, 468-469, 63 S. Ct. 1241, 1245-1246 (1943)).

Neither can an implied presumption substitute for proof of an essential ingredient of the offense (*Morissette v. United States,* 342 U.S. 246, 275, 72 S. Ct. 240, 256 (1952); *Christoffel v. United States, supra,* 383 U.S 84, 89-90, 69 S. Ct. 1447, 1450; *cf. United States v. Bryan,* 339 U.S. 323, 70 S. Ct. 739 (1950) (where the presumption was allowed because the assumed fact was collateral to the offense charged)).

The Court of Appeals below held that "the presumption of regularity of official acts is sufficient, at least, to preclude reversal where, as here, the issue of the

regularity of the order of call was not raised in the trial court." (Op. at p. 2).

Thus the Court in effect inferred Petitioner had *waived* the issue based on a silent record. But, as this Court has noted in another context:

> "Presuming waiver from a silent record is impermissible." (*Carnley v. Cochran,* 369 U.S. 506, 516, 82 S. Ct. 884, 890 (1962); *Miranda v. Arizona,* 384 U.S. 436, 475, 86 S. Ct. 1602, 1628 (1966); See also: *Johnson v. Zerbst,* 304 U.S. 458, 58 S. Ct. 1019).

If the burden of proving the validity of an induction order or the regularity of the order of call was upon the Government, Petitioner was under no duty to speak in the absence of proof, or to suggest what proof would be required, or to disclose his defenses thereto—including the defense of standing silent on an insufficient record (See: *Miranda v. Arizona, supra,* 384 U.S. at p. 460, and cases cited thereat).

Indeed, if the presumption relieves the Government of the obligation to produce evidence on the issue, it does so whether or not the accused puts the Government on notice. Accordingly, the opinion of the learned Court below leaves standing a conviction unsupported by proof which is conceded to be the Government's obligation to produce, but which duty the court presumes was waived by Petitioner's silence. If this unique but startling rationale be left to stand, the Defendant's mantle of innocence will soon be converted to a cloth woven so fine that only he will be able to see it.

V.

The Use of the Presumption of Regularity in Selective Service Cases Has Convoked Diverse and Often Questionable Rationales Therefore, Resulting in Conflicting and Confusing Applications Thereof, Not Only Between, but Within the Circuits.

As suggested by the opinion of the Court below, most Circuit Courts accept the view that the Government's burden of proof is met by reliance on the presumption of regularity, at least absent notice by defendant putting the validity of the induction order at issue (*Weersing v. United States,* #23055 (8-7-69) (Opinion below); *Yates v. United States, supra,* 404 F. 2d at pp. 465-466, rehr'g den. 407 F. 2d at p. 51); or evidence tending to rebut the presumption (*United States v. Sandbank,* 403 F. 2d 38, 40 (2nd Cir., 1969)) (although there is language suggesting that the invalidity of the order is an affirmative defense); *Greer v. United States,* 378 F. 2d 931, 933 (5th Cir., 1967); but see: *Chaney v. United States,* 406 F. 2d 809, 813 (5th Cir., 1969) (requiring *clear* and *convincing* evidence to rebut presumption); *Keene v. United States,* 266 F. 2d 378, 380 (10th Cir., 1959)).[9]

But despite apparent harmony among the circuits as to the propriety of invoking the presumption on a silent record, there is wide diversity and confusion on the rationale therefor and the circumstances and standards governing its application.

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[9]The opinions of the 6th Circuit in *United States v. Norman,* ..... F. 2d ..... (#18,779, Dec. 7-15-69), and *United States v. Boroski,* ..... F. 2d ...., (#18,548, Dec. 6-25-69) have not yet been reported, and were not available to undersigned at this writing.

Thus the Second Circuit views application of the presumption as merely "permitting the government to present its case-in-chief free of a technical nicety." (*United States v. Sandbank, supra,* 403 F. 2d at p. 40 (fn)).

On the other hand, the *Keene* court, while acknowledging that the government has the burden of proving the validity of the order, finds the presumption of regularity like the presumption of innocence, a "procedural safeguard." (*Keene v. United States, supra,* 266 F. 2d at p. 381).

We have already noted that the First Circuit, and presumably, by its emphasis on the rationale of *Yates, supra,* the Court of Appeals below, invoked the presumption on a *waiver* theory (*Yates v. United States, supra,* 404 F. 2d at p. 466). That is, the government is required to prove up the propriety of the order of call or otherwise establish the validity of the induction notice only when notified by the accused that the same is at issue.

Not so the Fifth Circuit, which, in *Chaney v. United States, supra,* 406 F. 2d at p. 813, recently held that evidence through the lips of the Local Board's clerk that the Board applied an erroneous view of the law to requests for reopening of classifications, was not sufficient to overcome the presumption of regularity.

Contrast that approach with the one taken by the Ninth Circuit in *Shepherd v. United States,* 217 F. 2d 942 (1954) where the Court of Appeals expressly refused to invoke the presumption of regularity to sustain an inference that an Appeal Board had disregarded the erroneous advice of the Department of Justice con-

cerning the claim of a conscientious objector (*Accord: Sicurella v. United States,* 348 U.S. 385, 75 S. Ct. 403 (1955)).

In some cases, the presumption of regularity has been applied, perhaps more appropriately, to *collateral* issues, as where the court has refused to draw inferences adverse to the Local Board's proceedings, either because based on speculation or conjecture, or on deductions which are unreasonable or irrelevant, or inconsistent with the record.

Thus, in *United States v. Bornemann,* 298 F. Supp. 1253, 1258 (D., Conn., 1969), the court refused to speculate that on a *de novo* review, the Appeal Board indulged in the same erroneous theories applied by the Local Board (See also: *Storey v. United States,* 370 F. 2d 255 (9th Cir., 1966); *Koch v. United States,* 150 F. 2d 762 (4th Cir., 1945) (evidence supported presumption); *United States v. Richmond,* 274 F. Supp. 43, 62 (C.D., Cal., 1967) (evidence supported presumption; issue collateral)).

VI.

The Presumption of Regularity Cannot Be Justified on Grounds of Convenience, Common Experience, Fact or Law.

Only in *Keene v. United States, supra,* 266 F. 2d at p. 381 (and inferentially, *Yates,* on rehearing (407 F. 2d at p. 51))—does a court expressly grapple with the conflicting presumption of innocence.[10] There,

[10]Of coure, the opinion in *United States v. Lybrand* 379 F. Supp. 74 at p. 82 (E.D., N.Y., 1967) expresses a "grave doubt about the propriety and the constitutionality of presuming an essential element of a serious crime. [Citing cases]." But *Lybrand* appears to have been overruled by *Sandbank, supra,* 403 F. 2d at p. 40.

after distinguishing *Tot v. United States, supra,* the *Keene* court states:

> "Neither do we think that traditional presumption of innocence overcomes the presumption of regularity and validity. Both are founded in the policy of the law as procedural safeguards [citing authorities]. They stand in lieu of fact until overcome by fact; they do not conflict, rather they operate successively to shift the duty of producing evidence at the ultimate risk of non-persuasion . . . one operates as an invulnerable cloak of innocence until removed by proof beyond a reasonable doubt; the other operates as a rule of law to sustain the burden of proof and support a finding of guilt . . ."

This theory ignores the teachings of *Leary, Romano* and *Tot,* to wit: That a presumption can only substitute for affirmative proof, if at all, where supported in reason and common experience and by a rational nexus between the fact presumed and the fact proved.

In none of the Selective Service cases invoking the presumption of regularity has the ultimate fact—that is, the validity of the induction order, or here, the propriety of the order of call—been restablished except by the presumption. So, the Tenth Circuit is saying that the accused must discard his mantle of innocence in response to a presumption which has support only in fiction and convenience.

In *Leary, Romano* and *Tot, supra,* the statutory presumption was also rebuttable, and likewise, was grounded on convenience. Its effect, if not its function was to compel the defendant to negative inferences from proved facts through his own testimony or by other evidence.

The presumption of regularity is from the same design and purpose and draws on the same rationale; but there is a significant distinction. In *Leary, Romano* and *Tot,* the defendant had knowledge which, theoretically at least, could dispel or rebut the inference (*Leary,* in fact, attempted to do so, albeit unsuccessfully).

With the presumption of regularity, however, knowledge or information of the irregularity of the order of call or other procedure is not necessarily in the possession of the accused, but rather is under the control and administration of the government. As the First Circuit noted in *Yates, supra,* (404 F. 2d at p. 466):

> "There is no difficulty in the perhaps rare case where a defendant can produce evidence of a person who should have been called before him but was not. In such a case, the government cannot disprove a leak in the bucket simply by showing that most of it was tight. But when the defendant lacks any such proof, his only recourse is to examine the clerk of the Local Board. This may not conclusively establish the absence of any violation of the regulation, but, *since the clerk must testify in any case to the validity of the order to report,* there is little extra burden on the government to have him prepared to testify on order of call." (Emphasis supplied).

Thus, on grounds of accessibility to proof and the probabilities of administrative error, the *Yates* court questions the propriety of indulging the presumption in lieu of proof.

It does so, in the final analysis, because "what is involved, while an element of the offense, has not been

deemed important enough in the particular case to make any effort to elicit facts . . ." (Emphasis supplied) (*Yates, supra,* 404 F. 2d at p. 466; see: *Sandbank, supra,* 403 F. 2d at p. 40 (fn.)). But, under the principles heretofore discussed, the court cannot infer waiver of proof from a silent record. For the accused there, as here, was simply exercising his constitutional right to remain silent—a right from which no adverse inferences may be drawn (see: *Griffin v. California,* 380 U.S. 609, 85 S. Ct. 1229 (1965); *Slochower v. Board of Higher Education of the City of N.Y.,* 350 U.S. 551, 557, 76 S. Ct. 637, 640).

Besides, as we have seen, the presumption of regularity as to order of call is not necessarily warranted (See: *United States v. Smith, supra,* 291 F. Supp. 63; *United States v. Miranda, supra,* 1 SSLR 3265). Unlike most administrative agencies, Local and Appeal Boards in the Selective Service System are comprised of lay persons serving voluntarily without special expertise or training,[11] and whose enormous case load defies reflective deliberation. These factors, combined with an extensive record of procedural error by Selective Service Boards,[12] raises a serious constitutional

[11]*Shepherd v. United States, supra,* 217 F. 2d at p. 945; *United States ex rel. Bergdoll v. Drum,* 107 F. 2d 897, 900 (2nd Cir., 1939). Local Board members testifying in two Selective Service cases in the Central District of California recently disclosed an unfamiliarity with many Selective Service regulations bearing on Board procedures and on classifications (*United States v. Ronald Jack Willens,* #2892-JC., 3/18-19/69 (unreported); *United States v. Daniel Lott,* #1921-P.H., 10/9/68 (unreported)). Copies of the reporter's transcripts are in the possession of the undersigned counsel, and will be made available to the court upon request.

[12]See Appendix F, *infra,* which contains a partial list of cases belying the presumption of regularity, usually to the regis-

(This footnote is continued on the next page)

question as to whether the presumption of regularity is justified, either in fact or law, in Selective Service cases.

VII.

The Selective Service File at Bar Discloses Procedural Error Which Strips the Local Board's Induction Order of Any Presumptive Validity to Which It Otherwise Might Have Been Entitled.

Petitioner's Selective Service file, reveals that no meeting was held by the Local Board preceding the issuance of the two induction orders in his case.[13]

Selective Service Regulation Section 1631.7(a) provides that each "Local Board . . . shall select and order" the required number of men for induction. The regulations are silent as to the powers or duties of a clerk, and refer to such employee only once (32 C.F.R. §1606.1).

On the other hand, 32 C.F.R. §1604.59 states:

> "Official papers issued by a Local Board may be signed by any compensated employee of the Local Board, if he is authorized to do so by resolution duly adopted by and entered in the minutes of the meetings of the Local Board; *provided,* that the Chairmen or member of the Local Board must sign a particular paper when specifically required to do so by the Director of Selective Service."

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trant's prejudice. It seems reasonable to assume that the number of such cases which do not reach the courts, or official publications, are many times the number appearing in Appendix F.

[13](SSF 13. See: Entry for June 20, 1967; Note: there appears to be no entry on the cover sheet for August 11, the date when Petitioner's second induction order was issued; but the latter document appears at p. 154 of the Selective Service file).

It would thus appear that the regulations contemplate a meeting of the Board at which registrants are selected for induction, and to confer authority upon either a clerk or Board member to sign an induction notice.

In *Brede v. United States*, 396 F. 2d 155, op. mod. 400 F. 2d 599 (9th Cir., 1968), a case involving an order to report for alternative civilian service, the 9th Circuit construed comparable regulations (32 C.F.R. §1660.20(b)) as requiring such a meeting of the Local Board. The court refused to apply the *Brede* doctrine to the case at bar on the ground that the issue was not raised at trial (Op. at p. 3).

However, if Petitioner's contention is correct, that is, that the Local Board was required to meet for the purpose of selecting and ordering men up for induction, then the record belies the presumption of regularity for it appears on the face of Petitioner's Selective Service file that no such meeting occurred.

At very least, if there was authority for the induction order, pursuant to a Board meeting, it would seem incumbent upon the government to prove it. If such a resolution existed, that burden could easily have been met—certainly more easily than could Petitioner prove its non-existence.

Conclusion.

The scope of judicial review in Selective Service cases is the narrowest known to the law. This, coupled with the history of administrative irregularity in the Selective Service System, the lack of training and expertise among its Board members, and the severe penalties that flow from conviction for failing to obey an induction

order, counsel cautious employment of the presumption of regularity as a substitute for proof.

Petitioner therefore urges that the government should be required to establish what it has alleged, based on records available to it. To impose or shift such duty upon the accused would require him to engage in a fishing expedition which obviously would not be sanctioned.

For the foregoing reasons, the within Petition For Certiorari should therefore be granted.

Respectfully submitted,

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APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeal for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. John Frederick Weersing, Defendant-Appellant. No. 23,055.

[August 7, 1969]

Appeal from the United States District Court for the Central District of California.

Before: BARNES, BROWNING, and CARTER, Circuit Judges.

BROWNING, Circuit Judge:

Defendant was convicted of refusing to submit to induction in violation of 50 U.S.C. App. § 462. We affirm.

The indictment alleged, in the words of the statute, that defendant "knowingly" refused to be inducted. Defendant contends that failure to allege that he acted "wilfully" renders the indictment materially defective.

We held in *Graves v. United States*, 252 F.2d 878, 882 (9th Cir. 1958), "that the word 'knowingly' in the statute here involved may not be as strong a word as 'wilfully' . . ., but the use of either of these words requires proof of culpable intent. . . ."[1] We did not hold, as defendant suggests, that the word "wilfully" must appear in the charge. On the contrary, although the indictment in *Graves* alleged that the defendant acted "knowingly," the conviction was reversed only for lack

[1]See also United States v. Rabb, 394 F.2d 230, 231-32 (3rd Cir. 1968).

of proof of culpable intent.[2] If, as *Graves* holds, the word "knowingly," in the statute, necessarily implies wilfulness, it is sufficient for the same purpose in a charge under the statute, absent any suggestion that defendant was misled or prejudiced in any way. *United States v. Beatty,* 350 F.2d 287 (6th Cir. 1965). Neither of the cases cited by defendant as direct contrary authority so hold.[3]

Defendant contends that the government failed to prove that he was ordered to report for induction by the local bard pursuant to its authority, or that he was selected for induction in proper order.

Defendant did not challenge the sufficiency of the evidence in either respect in the trial court.

The Courts of Appeals of five circuits have considered whether the government must affirmatively establish as a part of its case-in-chief that the order to the defendant to report for induction was issued in the sequence provided by Selective Service Regulation 32 C.F.R. § 1631.7. While the precise problem presented and the rationale applied differ in the various cases, it is clear that all of these courts would agree that the presumption of regularity of official acts is sufficient, at least, to preclude reversal when, as here, the issue of the regularity of the order of call was not raised in the trial court. *United States v. Norman,* .... F.2d (6th Cir. 1969), No. 18,779, filed July 15, 1969; *Little v. United States,* .... F.2d .... (10th Cir. 1969), No. 153-68, filed May 6, 1969; *United States v. Boroski,*

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[2]Defendant does not challenge the sufficiency of the evidence to establish culpable intent.

[3]Potter v. United States, 155 U.S. 438, 446 (1894); United States v. Baker, 262 F.Supp. 657, 678 (D.D.C. 1966).

.... F.2d .... (6th Cir. 1969), No. 18,548, filed June 25, 1969; *Yates v. United States,* 404 F.2d 462, 465-66 (1st Cir. 1968), rehearing denied 407 F.2d 50 (1969); *United States v. Sandbank,* 403 F.2d 38, 40 (2d Cir. 1968); *Pique v. United States,* 389 F.2d 765 (5th Cir. 1968); *Lowe v. United States,* 389 F.2d 51, 52 (5th Cir. 1968); *Greer v. United States,* 378 F.2d 931, 933 (5th Cir. 1967). We see no reason to depart from this unanimity of view.

The reasons supporting this position (*see particularly Yates v. United States, supra,* 404 F.2d at 465-66) apply equally to absence of specific proof that the order to defendant to report for induction was issued or authorized by the local board itself rather than by the board member who signed it. Accordingly, assuming that Selective Service Regulation § 1631.7(a) required action by the whole board in issuing or authorizing the order to report for induction, we hold that lack of proof of specific compliance with this requirement is not a ground for reversal when, as here, the issue was not raised at trial. *Little v. United States, supra.*[4]

The defendant requested but was denied deferment as a person "whose employment . . . is . . . necessary to the maintenance of the national health, safety, or interest." 50 U.S.C.App. § 456(h)(2). He contends that the denial was without basis in fact; and that the local board should have given him notice of his right to have the appeal from its action heard by the appeal board for the area in which he was employed. Neither conten-

[4]The record in Brede v. United States, 396 F.2d 155 (9th Cir. 1968), modified 400 F.2d 599 (9th Cir. 1968), discloses that failure of the local board to comply with Selective Service Regulation § 1660.20(d) was raised by motion for judgment of acquittal at the close of the prosecution's case.

tion was made in the trial court. Assuming they are properly before us, we hold they are without merit.

Whether or not we would have reached the same conclusion as the board on the merits of defendant's request for occupational deferment, we are satisfied that there was a basis in fact for the board's decision.

To obtain a deferment under section 465(h)(2), the registrant must satisfy the board (1) that he is engaged in activity necessary to the maintenance of the national health, safety, or interest; (2) that he cannot be replaced; and (3) that his removal would cause a material loss of effectiveness in the activity. 32 C.F.R. § 1622.23.

Defendant based his request upon his employment as an assistant planner in the Planning Department of the City of San Diego, specializing in the application of electronic digital computer techniques to city planning. He pointed out that city planning improves the environment of urban dwellers, particularly in housing and transportation, and that a favorable environment enhances their productivity. He noted that San Diego is the site of important naval activities employing many San Diego workers. He offered evidence that there was a scarcity of persons trained in both city planning and electronic data processing, and that this combination of skills was of unusual importance to the effective development of a number of specific programs in the San Diego City Planning Department.

We think the board could properly determine from this showing that the relationship between defendant's employment and the maintenance of national health, safety, and interest ws too remote and indirect to jus-

tify deferment under section 456(h)(2). The board could conclude that city planning; as such, was no more directly related to the national health, safety, or interest than many if not most other municipal services, and that San Diego's involvement in one aspect of national defense was not materially greater than the involvement of other American cities of equal size in other aspects of the complex and widespread national defense effort.

The record also contained facts to support the conclusion that defendant was not irreplaceable and that his removal would not cause material loss to the effectiveness of city planning in San Diego. The board noted that defendant had been employed in his position for only five months, and that he was one of two persons engaged in research and computer programing in the San Diego Planning Department. Moreover, while defendant's supervisor initially wrote, "We have no one available, nor do we know of anyone, who could replace him in the type of program he is now establishing for us," he later stated, somewhat less sweepingly, that defendant was "one of the relatively few people available to us" with the requisite qualifications.

Defendant contends that the board should have advised him of his right to have his appeal submitted to the appeal board for the area in which he was employed, rather than to the appeal board for the area in which his local board was located. 32 C.F.R. § 1626.11(b). The right conferred by section 1626.11(b) is conditioned upon the filing of a written request. No such request was filed until after the appeal had been decided adversely to the defendant. Defendant argues, however, that the circumstances disclosed in this record imposed an obligation upon the local board to transfer the ap-

peal without a written request or to call defendant's attention to the regulation so that he might invoke its provisions.

Defendant lived and worked in San Diego, where there were both local boards and an appeal board. Defendant's local board was located in Pasadena, and his appeal board in Los Angeles. Defendant had appeared personally before the Pasadena local board, traveling from San Diego for this purpose. He advised his local board that he would like to appear personally before the appeal board "if necessary," and asked when the appeal board would meet since it was "a longe drive to Pasadena." Since the regulations did not provide for a personal appearance before the appeal board, the local board did not respond to defendant's inquiry but simply forwarded the file to the appeal board, which affirmed the local board's rejection of defendant's claim.

We see nothing in these circumstances to alert the local board to defendant's desire that the appeal be heard by the San Diego appeal board, if indeed this was defendant's wish prior to the adverse decision of the Los Angeles appeal board. On an earlier occasion defendant had arranged with his Pasadena local board for transfer to a San Diego board for his physical examination. He did not request a general transfer from the Pasadena local board to a San Diego local board; and he later traveled to Pasadena for a personal appearance before that local board in support of his request for occupational deferment. If the question occurred to the board at all, it could properly have assumed that, for reasons of his own, defendant preferred not to have his appeal submitted to the San Diego appeal board. Certainly we cannot say that the local board's failure to transfer

the appeal sua sponte or to inquire as to defendant's wishes violated the regulations or denied defendant procedural due process.

The defendant's final contention is that the local board improperly refused to reopen his classification and consider his conscientious objector claim.

The local board mailed defendant an induction notice on June 20, 1967. On June 24 defendant wrote to the board claiming exemption as a conscientious objector. His letter arrived on June 26.

The board was without power to reopen defendant's classification after mailing the induction notice unless it could specifically find that there had been a change in defendant's status resulting from circumstances over which he had no control. 32 C.F.R. § 1625.2.

We need not decide whether the maturing of a conscientious objection to war is a circumstance "over which the registrant had no control"—a question now pending before this court in banc in *Ehlert v. United States,* No. 21,930. The board must also find that "a change in the registrant's status" occurred after the mailing of the notice of induction; and defendant offered no facts upon which such a finding might have been based.

In his SSS Form No. 150 defendant attributed his convictions to participation in church activities as a child, parental influence, and college training—all of which occurred long prior to the mailing of defendant's notice of induction.

Defendant wrote to his draft board that the arrival of this notice precipitated the filing of his conscientious objector claim and that he had not submitted it earlier

because he had mistakenly supposed that appellate processing of his claim for an occupational deferment was not completed and an order to report for induction therefore would not be issued.[5] As the trial court said, "defendant's letter asserting for the first time his views on conscientious objector matters clearly reveals no new views or recent maturing or changing of them in the two, or at most four-day period between the notice of induction and the sending of this letter. In fact, it reveals to the contrary. What is new is the determination to assert these views in view of the induction notice now having come to him. And it is clear that that assertion was precipitated, as he says himself, by the induction notice, and not by any change or difference in the views themselves." *See Oshatz v. United States,* 404 F.2d 9, 10-11 (9th Cir. 1969); *Briggs v. United States,* 397 F.2d 370, 372 (9th Cir. 1968); *United States v. Dugdale,* 389 F.2d 482, 484-85 (9th Cir. 1968).

Affirmed.

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[5]The letter read, in part:

"You may question the late arrival of this statement of beliefs. It is in part precipitated by the arrival of an order to report for induction: I was suddenly and absolutely faced with having to throw over my life's work and, within fifteen days, begin an instructional regimen of violence and mayhem.

Also, I was misled by the State Selective Service Headquarters when they informed me in a letter dated June 13, 1967 that '. . . if you have further questions regarding your rights, we suggest you contact your local board for an appointment with the appeal agent.' I construed this as meaning I had an additional period in which to review my case with legal counsel to prepare another appeal, and that this would grant me the usual immunity from induction while this was pending. *If I had believed otherwise, I would not have delayed in bringing this new information to your attention*" (emphasis added).

APPENDIX B.

Title 50 App., U.S.C. §462(a).

Title 50 App. U.S.C. §462(a) which states in relevant part as follows:

> "(a) . . . any . . . . person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

APPENDIX C.

Title 50 Appx., U.S.C. §454(a).

Title 50 Appx. U.S.C. §454(a) which provides in pertinent part as follows:

> ". . . the President is authorized, from time to time, . . . to select and induct into the Armed Forces of the United States for training and service in the manner provided in this Title . . . such number of persons as may be required to provide and maintain the strength of the Armed Forces."

APPENDIX D.

Title 50, Appx., U.S.C. §455(a).

Title 50, Appx., U.S.C. §455(a), provides in relevant part as follows:

"(a)(1) The selection of persons for training and service under §4 [§454 of this Title] shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the persons who are liable for such training and service and who at the time of selection are registered and classified, but not deferred or exempted . . .

* * *

"(2) Notwithstanding the provisions of Paragraph (1) of this subjection, the President in establishing the order of induction for registrants within the various age groups found qualified for induction shall not effect any change in the method of determining the relative order of induction for such registrants within such age groups as has been heretofore established and in effect on the date of enactment of this paragraph [June 30, 1967], unless authorized by law enacted [thereafter] . . ."

APPENDIX E.

32 C.F.R. §1631.7(a).

32 C.F.R. §1631.7(a) which provides, in pertinent part, as follows:

> "(a) When a call is placed without designation of age group or groups, each Local Board, upon receiving a Notice of Call on Local Board (SSS Form 201) from the State Director of Selective Service . . . shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class 1-A and Class 1-A-O and have been found acceptable for service in the Armed Forces and to whom the Local Board has mailed a Statement of Acceptability (DD Form 62) at least 21 days before the date fixed for induction; Provided, that a registrant classified in Class 1-A or Class 1-A-O who is delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and has not been mailed a Statement of Acceptability (DD Form 62); *And provided further,* that a registrant classified in Class 1-A or Class 1-A-O who has volunteered for induction may be selected and ordered to report for induction notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and regardless of whether or not a Statement of Acceptability (DD Form 62) has been mailed to him. Such registrants . . . shall be selected and ordered to report for induction in the following order:

"(1) Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

(2) Volunteers who have not attained the age of 26 years in the sequence in which they have volunteered for induction.

(3) Non-volunteers who have attained the age of 19 years and have not attained the age of 26 years and who (A) do not have a wife . . . in the order of their dates of birth with the oldest being selected first, or (B) who have a wife whom they married after [August 26, 1965] . . . in the order of their dates of birth with the oldest being selected first.

(4) Non-volunteers [between 19 and 26 who married before August 26, 1965]. . . .

(5) Non-volunteers who have attained the age of 26 years in the order of their dates of birth with the youngest being selected first.

(6) Non-volunteers who have attained the age of 18 years and 6 months and who have not attained the age of 19 years . . .

* * *"

APPENDIX F.

Partial List of Selective Service Cases Disclosing Administrative Irregularities and Procedural Errors.

The following is a partial list of selective service cases disclosing administrative irregularities and procedural errors. It is offered as tending to show that the presumption of regularity is not applicable to the selective service field because not supported by fact or common experience.

Oesterich v. Selective Service Local Board No. 11, 393 U.S. 233, 99 S. Ct. 414 (punitive reclassification of theology student for protest against war); *Application of Shapiro,* 392 F. 2d 397 (3d Cir., 1968) (1-A classification invalidated because of lack of quorum); *Talcot v. Reed,* 217 F. 2d 360 (9th Cir., 1954) (Failure of Board to grant personal appearance; wrongful denial of reopening of classification based on Selective Service Bulletin holding pregnancy to be a status over which registrant has control, so as to bar, on that account, post-induction notice reopening); *In re Abramson,* 196 F. 2d 261 (3d Cir., 1952) (Induction notice sent to wrong city); *Franks v. United States,* 216 F. 2d 266 (9th Cir., 1954), (Failure of Local Board to consider classification for which registrant eligible); *Knox v. United States,* 200 F. 2d 398, and cases cited at p. 401, (9th Cir., 1952) (Failure to reclassify registrant after personal appearance, thereby depriving him of appeal rights; court refuses to invoke presumption of regularity as aid to conviction); *Peebles v. United States,* 220 F. 2d 114 (C.A. 7, 1955) (Board members found biased and prejudiced v. registrant claiming C.O.

status); *Uffelman v. United States,* 230 F. 2d 297 (9th Cir., 1956) (Failure of Board to appoint advisors to registrants to post their names, held not prejudicial error); *Gatchell v. United States,* 378 F. 2d 287 (9th Cir., 1967) (Appeals Board's application of erroneous standards to ministerial claim); *Accord: Sicurella v. United States,* 348 U.S. 385, 392, 75 S. Ct. 403; *Shepard v. United States,* 217 F. 2d 942, 944-946 (9th Cir., 1954); *United States v. Stepler,* 258 F. 2d 310, 317 (3d Cir., 1958); *Henderson v. United States,* 223 F. 2d 421 (7th Cir., 1955); *Olvera v. United States,* 223 F. 2d 880 (5th Cir., 1955); *Townsend v. Zimmerman,* 237 F. 2d 376 (6th Cir., 1956) (Failure of Local Board Chairman to adhere to regularities held prejudicial to registrant's appeal rights); *Mizrahi v. United States,* 409 F. 2d 1219 (9th Cir., 1969) (refusal to reopen based on erroneous interpretation of regulations and improper standards); *Accord: United States v. Freeman,* 388 F. 2d 246, 248 (7th Cir., 1967; reh'g den'd 1968); *United States v. Stafford,* 389 F. 2d 215 (2d Cir., 1968); *Petrie v. United States,* 407 F. 2d 267 (9th Cir., 1969); *Woo v. United States,* 350 F. 2d 992 (9th Cir., 1965)); *Battiste v. United States,* 409 F. 2d 910 (5th Cir., 1969) (Failure of Board's clerk to refer registrant's letter to Local Board held not prejudicial); *Brede v. United States,* 396 F. 2d 155, modified, 400 F. 2d 599 (9th Cir., 1968) (Unauthorized issuance of induction order); *United States v. Bellmer,* 404 F. 2d 132 (3d Cir., 1968) (Failure of Board to forward registrant's letter to State Director; absence from file at trial defeats presumption of regularity); *Chaney v. United States,* 406 F. 2d 809 (C.A. 5th, 1969) (Refusal to reopen based on erroneous view

of law, held not prejudicial; clerk's testimony not sufficiently *clear and convincing* as to overcome presumption of regularity) (*Crane v. Hershey,* 410 F. 2d 962, 966 (1st Cir., 1969) Erroneous denial of 1-S classification based on National Director's Memorandum in direct conflict with standard; *accord: Foley v. Hershey,* 409 F. 2d 827 (7th Cir., 1969); *Catano v. Local Board No. 94,* 298 F. Supp. 1183 (E.D. Pa., 1969)); *Shepard v. United States,* 217 F. 2d 942 (9th Cir. 1954), rehearing denied, 220 F. 2d 855 (9th Cir., 1955), (Appeal Board *presumed* to have followed erroneous advice of Department of Justice). *United States v. Walsh,* 279 F. Supp. 115 (D.C. Mass, 1968) (Failure of Local Board to meet and consider request for reopening of classification); *United States v. Burlich,* 257 F. Supp. 906 (S.D. N.Y., 1966) (Failure to reopen classification upon presentation of prima facie claim for new classification; Accord: *United States v. Vincelli,* 215 F. 2d 210; rehearing denied, 216 F. 2d 681 (2nd Cir., 1954); *United States ex rel. Berman v. Craig,* 207 F. 2d 888 (3d Cir., 1953)); *United States v. Kezmes,* 125 F. Supp. 300 (W.D. Pa. 1954) (Denial of 4-D exemption based on erroneous theories); *United States v. Rund,* 299 F. Supp. 408 (D, N.D., 1969) (No basis in fact for refusal to classify registrant 1-0); *United States v. Blaisdell,* 294 F. Supp. 1303 (D., Me., 1968) (Failure of Local Board to consider post-induction Notice C.O. claim held to preclude conviction); *United States v. St. Clair,* 293 F. Supp. 337 (E.D.N.Y., 1968) (denial of C.O. claim based on erroneous theories); *Accord: United States v. Shacter,* 293 F. Supp. 1057 (D., Md., 1968); *United States v. Bryant,* 293 F. Supp. 922 (W.D., Ark., 1968); *Cupit*

v. United States, 292 F. Supp. 146 (W.D., Wis., 1968) (Order to report for civilian work not authorized by Board); *United States v. Fargas,* 66 Cr. 792 (S.D. N.Y., 1969) and *United States v. Hudson,* 67 Cr. 681 (S.D.N.Y., 1969) .... F. Supp. ...., 1 S.S.L.R. 3365 (Substitution of Documents in registrant's files by Selective Service offices following indictment; and procedural irregularities in processing of C.O. claims); *United States v. Deppe,* No. 67 Cr. 473 (E.D., N.Y., 11/21/68) 1 S.S.L.R. 3285 (Dismissal on motion of government on discovering that member of Local Board did not reside in city where Board located); *United States v. McNeal,* No. 41, 993 (N.D., Cal., 9/10/68) 1 S.S.L.R. 3227 (failure of Local Board to consider 1-S claim, or to supply registrant with C.O. form when requested to do so; on latter point, see also: *Boswell v. United States,* 390 F. 2d 181 (C.A. 9th, 1968)); *United States v. Madrid,* No. 68-82-S.A. (W.D., Tex., 8/7/68) 1 S.S.L.R. 3168 (induction order issued while appeal pending); *Striker v. Resor,* 283 F. Supp. 923 (D., N.J., 1968) (possible consideration by Board of anonymous phone messages concerning registrant's alleged immorality, misinformation to registrant regarding his rights; See also: *In re Schmidt,* 68 F. Supp. 765 (N.D., Cal., 1946) (reclassification based on erroneous hearsay regarding registrant's activities)); *United States v. Giessel,* 129 F. Supp. 223 (D., N.J., 1955) (failure to advise registrant of his procedural rights); *Ex Parte Barrial,* 101 F. Supp. 348 (S.D., Cal., 1951) (1-A classification and induction based on Local Board resolving contravening regularities).

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 634

JOHN FREDERICK WEERSING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1969. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to September 22, 1969. The petition was filed on September 23, 1969, and is thus out of time under Rule

22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a prosecution for failure to comply with an induction order, the government was required to prove affirmatively that petitioner had not been called out of turn, where his Selective Service file containing the induction order was admitted into evidence by stipulation and the defense raised no such issue at trial.

STATEMENT

After a jury-waived trial, petitioner was convicted in the United States District Court for the Central District of California of refusing to be inducted into the Armed Forces, in violation of 50 U.S.C. App. 462. On May 27, 1968, he was sentenced to three years' imprisonment. The court of appeals affirmed.

The government's evidence consisted of petitioner's Selective Service file, admitted into evidence by stipulation (2 R. 4-5).[1] The file showed that petitioner, born in October 1942, registered with the Selective Service System in 1960, and was thereafter granted student deferments in 1963, 1964 and 1966 (SSF 16-37; 2 R. 14-15). After completion of his post-graduate studies, petitioner took a position with a

[1] "R." preceded by the volume number refers to the two-volume record on file with the Clerk of this Court. The trial transcript is contained in volume two, with petitioner's Selective Service file (herein referred to as "SSF") included as an exhibit.

municipal government as a city planner (SSF 37). On September 7, 1966, he was found qualified for induction (SSF 61). In June 1967, he was ordered to report for induction (SSF 154). On August 29, 1967, petitioner reported, was reexamined and found fit for military service, but refused induction (SSF 63, 79-81).

At trial, petitioner was represented by counsel of his own choice who had twenty-four years of legal experience and some familiarity with Selective Service cases (see 2 R. 58). The issues raised at trial were the handling of petitioner's claims for deferment and exemption (2 R. 14-23).[2] Petitioner did not raise any claim at trial that his induction order was invalid or not issued in conformity with the order-of-call provisions of 32 C.F.R. 1631.7 (set out at Pet. App. 12-13).

ARGUMENT

As noted previously, the petition is out of time. In any event, the case does not warrant further review. The trial court had offered to it, by way of stipulation, petitioner's Selective Service file which contained his induction order (SSF 154). There being no objec-

[2] In addition to his student deferments, petitioner later requested but was denied special status sought on other grounds. In August 1966 he requested but was denied an occupational deferment. In June 1967, after being ordered to report for induction, he claimed to be a conscientious objector. He was denied this exemption (SSF 44-47, 83-93, 99, 104, 113, 124-132, 139-153). No question is now raised concerning the denial of conscientious objector status. This issue is fully treated in the opinion below (Pet. App. 7-8).

tion to the validity of this order, the trial court acted well within its discretion in determining that the order in the file was competent proof of what it purported to be. *Parrott* v. *United States*, 370 F. 2d 388 (C.A. 9), certiorari denied *sub nom. Lawrence* v. *United States*, 387 U.S. 908.[3]

Nor, in this factual setting, was it improper for the court of appeals to rely on a presumption of administrative regularity to the effect that registrants are ordinarily called in proper sequence as required by the pertinent administrative regulation—32 C.F.R. 1631.7. Whatever may be the differences in theoretical approach, as petitioner recognizes (Pet. 14), the courts of appeals are in harmony that, absent an issue regarding the order of call being raised at trial, it may be assumed on appeal that registrants were called in proper order. See, *e.g.*, *United States* v. *Sandbank*, 403 F. 2d 38 (C.A. 2), certiorari denied, 394 U.S. 961; *Yates* v. *United States*, 404 F. 2d 462 (C.A. 1), rehearing denied, 407 F. 2d 50, certiorari denied, 395 U.S. 925.[4] Indeed, since petitioner fit into the "non-volunteer" category (SSF 137) and was almost twenty-five[5] years old at the time of his

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[3] Petitioner now contends that this issue was raised in his motion for a judgment of acquittal (Pet. 5-6). This motion, however, made no reference to the issue, and no question as to the validity of the induction order was raised at trial.

[4] See also the cases cited in our brief in opposition in the *Yates* case, No. 1731 Misc., 1968 Term, a copy of which we are providing to counsel for petitioner.

[5] Under 32 C.F.R. 1631.7, the oldest non-volunteers, between the ages of 19 and 26, are required to be selected first within

refusal, the possibility that he was called out of sequence is remote. He was deferred from 1963 to 1966 and was not ordered to report until August 1967; it thus seems apparent that his call-up was not accelerated. No reason is suggested by petitioner why this Court should now give plenary review to an issue which it recently refused to consider in the *Sandbank* and *Yates* cases.

From the absence of an entry on August 11, 1967, on petitioner's cover sheet, he reasons that this omission signifies an administrative irregularity connoting that the local board failed to meet and select petitioner for induction (Pet. 20-21). The cover sheet (SSF 13-14) shows, however, that, on June 20, 1967, petitioner was selected by the presumptively valid action of his Pasadena local board, for induction on July 5, 1967. At petitioner's request and for his convenience his file was forwarded to San Diego so he could report for induction in that area (SSF 13, 137). This transfer, accomplished on July 12, 1967, necessarily had the effect of delaying the induction planned for July 5. Since the cover sheet notation read "Transfer Board No. 139 San Diego for Jul 5 1967 Induction," it was obvious that the San Diego board was to call up petitioner as soon as practicable. He was not entitled to any reexamination of his file or reconsideration by the transferee board, but only to information regarding his reporting date in the San Diego area. This he had already

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that category, after delinquents and volunteers (see Pet. App. 13).

received, however, incident to his June selection by the Pasadena board[6] (SSF 154).

CONCLUSION

For the reasons stated, it respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

JEROME M. FEIT,
EDWARD FENIG,
Attorneys.

OCTOBER, 1969.

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[6] There is thus no conflict here with the earlier decision of the Ninth Circuit in *Brede* v. *United States*, 400 F. 2d 599, 600, modifying 396 F. 2d 155. In *Brede* I, the Ninth Circuit had held that an order to report for civilian work assignment issued by a clerk was not a board "order". In *Brede* II, the Court amended its opinion to make clear that the order to report could be made contingent on later authorization at a board meeting. Here, as shown above, the board, and not the clerk, selected petitioner for induction. Moreover, as the court below pointed out, the issue in *Brede* was raised by motion for judgment of acquittal (see Pet. App. 3, n. 4). Here, as noted, no issue regarding the matter of proper selection was raised until the case was on appeal.

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IN THE

Supreme Court of the United States

October Term, 1969
No. 634

JOHN FREDERICK WEERSING,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner's Reply to Brief for the United States in Opposition.

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UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner's Reply to Brief for the United States in Opposition.

Statement.

The Solicitor General suggests in his Brief for the United States in Opposition at pp. 1, 3, that the Petition for Writ of Certiorari is untimely because filed on September 23, 1969, one day after the date on which it was due by virtue of the extension of time granted by Mr. Justice Douglas.

The Petition for Writ of Certiorari was printed and sent off to the Court by Parker & Son, Inc., located at 611 West Sixth Street, Los Angeles, California. To the knowledge of undersigned, this firm has had many years of experience in printing, serving and filing, or causing to be filed; petitions for writs of certiorari, briefs, and other documents with the United States

Supreme Court; and undersigned counsel have used this firm on several occasions in the past.

Upon receipt of the Solicitor General's Brief in Opposition, undersigned counsel requested Parker & Sons to investigate the matter and to furnish documents relating to the delivery of the petitions to the Clerk of the Court.

Petitioner has since been advised with respect thereto as follows:

Parker & Son airmailed on Friday, September 19, 1969, the three copies of said Petition served on respondent United States. According to the acknowledgement of service filed by the Solicitor General, said three copies were received by him, at the Department of Justice in Washington, on Monday, September 22, 1969, the date when the Petitions were due.

The Petitions to be filed with the Court were sent to the Clerk of the United States Supreme Court by air freight via Airland Freight Consolidators, Inc., at 7:30 P.M. on September 19, 1969. A copy of the shipper's receipt, reflecting the foregoing, is appended hereto as Exhibit "A", and by this reference, is incorporated herein and made a part hereof.

In a letter signed by a Mr. Oland Davis, Jr., Manager of said Airland Freight Consolidators, Inc., (a copy of which is appended hereto as Exhibit "B", and by reference incorporated herein and made a part hereof), said Petitions were shipped by air the same evening, and arrived "in DCA on SATURDAY MORNING, SEPTEMBER 20, 1969, APPROXIMATELY 0900 (i.e., 9:00 A.M.)." Mr. Davis then explains:

> "Our agent in Washington, D.C. was not aware that deliveries could be made to the Supreme Court before noon on Saturdays. He held this freight for a Monday regular delivery."

Mr. Davis further states that the driver routed the Petitions "for a late Monday evening delivery, as there were no markings to indicate on the Air-Land Freight bill that this was a rush shipment."

Apparently when the driver attempted delivery, "the clerk was not in so he attempted to deliver to the gate guard" who, of course, refused to accept it.

The driver then delivered the package at 10:00 A.M. the following morning, September 23, 1969.

After an ebullient, if fatuous, commercial, Mr. Davis concludes his letter with the following comment:

> "I have made arrangements with our people in DCA to deliver freight to the Supreme Court Building before noon on Saturdays, and I am quite confident this oversight will not re-occur."

Setting aside the brighter prospects for future customers of Airland Freight Consolidators, Inc., it would appear that but for the naivete, ignorance and negligence of that company, petitioner's application for Writ of Certiorari would have been received by the Clerk two days before due, or at least by the due date.

Undersigned counsel expressly advised Parker & Son of the due date, and were assured by that firm that the petitions would be prepared and sent to the Court for filing on, if not before the due date. Out of an abundance of caution, undersigned counsel verified the shipment of the petitions with Parker the evening of

September 19, and, with such assurances, petitioner's counsel assumed that the Petitions would be delivered to the Court in ample time. Undersigned counsel were, of course, totally unaware that Airland was treating the shipment in the cavalier fashion described in its letter (Exhibit "B").

It may be further noted that, pursuant to petitioner's request, the certified record was lodged with the Clerk of the Court on or about September 3, 1969—long prior to the date on which the Petition was due.

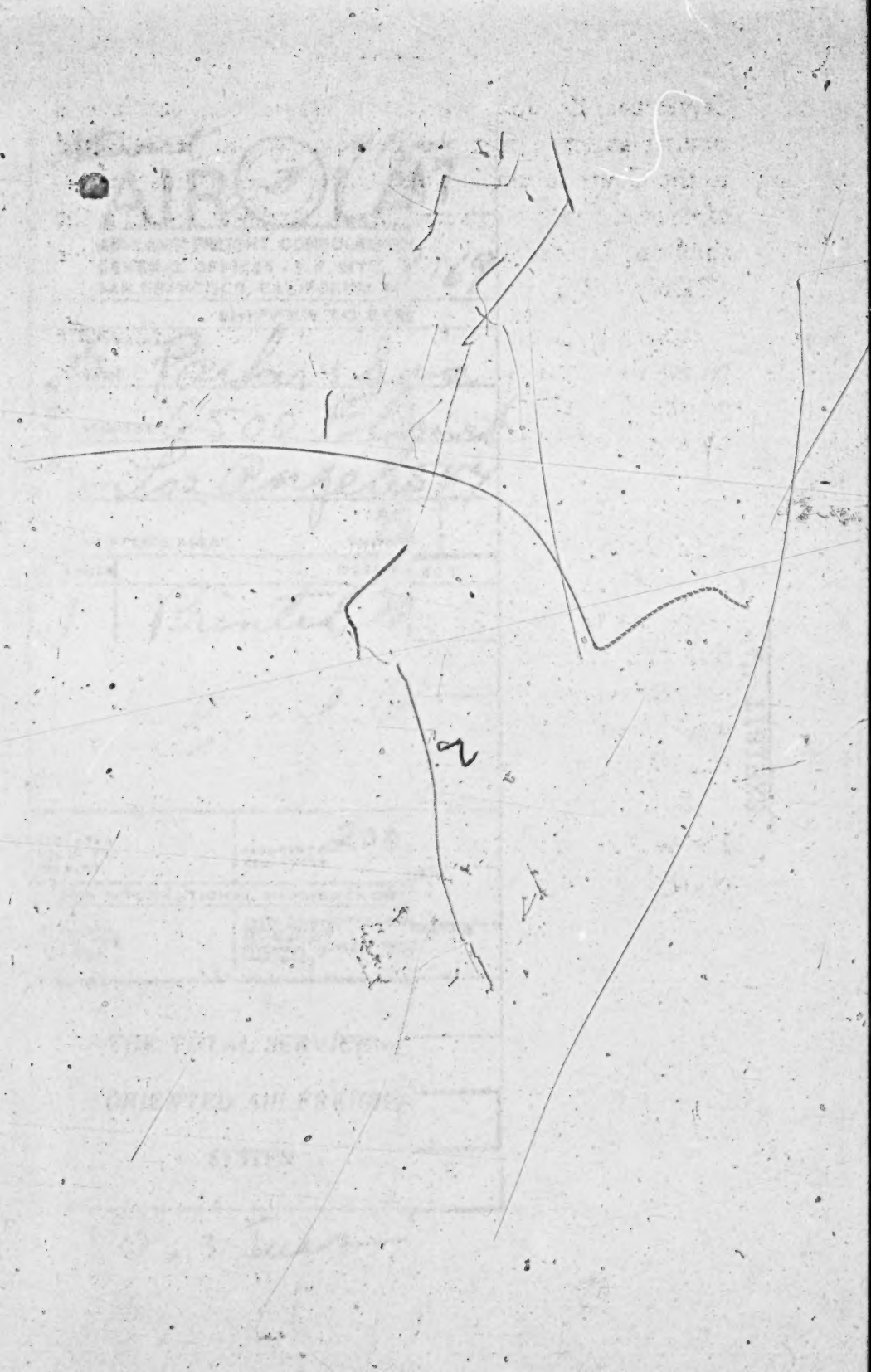
Conclusion.

In view of the receipt and docketing of the Petitions on the morning following the due date, and because the untimely filing was beyond petitioner's control, and does not appear to have prejudiced the government or parties concerned, the interests of justice would seem to require that the Petition be deemed filed timely, and that the Petition be considered on its merits.

Accordingly, it is respectfully submitted that the Petition for Writ of Certiorari should be deemed timely filed, and should be granted.

Respectfully submitted,

DAVID B. FINKEL and
HUGH R. MANES,
Attorneys for Petitioner.



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	103147

DEST.	VIA	DATE
		9/19/69

SHIPPER TO COMPLETE ALL INFORMATION ABOVE BOLD LINE AND SHIPPER'S C.O.D.

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CITY Los Angeles, Ca 90022

SHIPPER'S AGENT 4051 SHIPPER'S NO.

TO

COLLECT

NAME Hon John F. Davis

ADDRESS Clerk U.S. Supreme Court.

CITY Washington, D.C 20544

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1	Printed Matter-Briefs	9		

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OTHER CHARGES	
C.O.D. FEE	
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TOTAL CHARGES	

DECLARED VALUE FOR CARRIAGE

INSURANCE REQUESTED 200.00

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SHIPPER'S DOOR ☐ AIRPORT ☐

DATE 9/19/69 TIME 1930

SIGNATURE Terry Schiavo

THE TOTAL SERVICE — ORIENTED AIR FREIGHT SYSTEM

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I. SHIPPER'S RECEIPT

5761 West 98th Street / Los Angeles, Ca. 90045 / Telephone (213) 776-5

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30 October 1969

Mr. Robert M. Parker, Vice President
Parker & Son
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Dear Mr. Parker,

On Friday September 19, 1969, we shipped one package weighing 10 pounds of printed matter to Washington, D.C. on our Air-Land airbill number 103147, consigned to the Honorable John F. Davis.

This freight arrived in DCA on Saturday morning, September 20, 1969 approximately 0900. Our agent in Washington, D.C. was not aware that deliveries could be made to the Supreme Court before noon on Saturdays. He held this freight for a Monday regular delivery. His driver had this freight routed for a late Monday evening delivery, as there were no markings to indicate on the Air-Land Freight bill that this was a rush shipment. When he attempted delivery the clerk was not in so he attempted to deliver to the gate guard. The guard would not accept the freight. It was then delivered the next day at 10:00 a.m.

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In the future when you have a rush shipment, please indicate in the special instruction space located at the bottom center of our Air-Land airbills.

I have made arrangements with our people in DCA to deliver freight to the Supreme Court Building before noon on Saturdays and I am quite confident that this oversight will not re-occur.

Sincerely,

Oland Davis, Jr.
Manager, Intensive Care
Air-Land Freight

OD/mb

EXHIBIT "B"